



January 27, 2006

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## SENATE BILL No. 360

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DIGEST OF SB 360 (Updated January 25, 2006 5:11 pm - DI 87)

**Citations Affected:** IC 4-13.6; IC 5-16; IC 5-30; IC 8-15; IC 8-23; IC 36-1; noncode.

**Synopsis:** Bonds for public works projects. Increases the threshold at which bid, performance, and payment bonds are required for state and local public works contracts to \$500,000.

**Effective:** June 30, 2006; July 1, 2006.

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**Ford, Young R Michael, Rogers**

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January 10, 2006, read first time and referred to Committee on Governmental Affairs and Interstate Cooperation.  
January 26, 2006, reported favorably — Do Pass.

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SB 360—LS 7118/DI 75+



January 27, 2006

Second Regular Session 114th General Assembly (2006)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2005 Regular Session of the General Assembly.

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## SENATE BILL No. 360

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A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

*Be it enacted by the General Assembly of the State of Indiana:*

1 SECTION 1. IC 4-13.6-7-1 IS AMENDED TO READ AS  
2 FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 1. The director may  
3 apply **the retainage provisions of** this chapter to public works projects  
4 with an estimated cost less than the ~~amounts~~ **amount** specified in  
5 section 2 ~~or~~ 7 of this chapter.

6 SECTION 2. IC 4-13.6-7-5 IS AMENDED TO READ AS  
7 FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 5. (a) **This section does**  
8 **not apply to a public works project if the estimated cost of the**  
9 **public works project is less than or equal to five hundred thousand**  
10 **dollars (\$500,000).**

11 **(b)** The director may require each contractor to submit a good and  
12 sufficient bid bond with the bid. The bid bond may equal any  
13 percentage of the estimated cost of the public works project that the  
14 director requires.

15 ~~(b)~~ **(c)** The division may accept bonds provided on forms specified  
16 by the department or on forms given by surety companies.

17 SECTION 3. IC 4-13.6-7-6 IS AMENDED TO READ AS

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FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 6. (a) If the estimated cost of the public works project is ~~at least one more than five~~ hundred fifty thousand dollars ~~(\$150,000)~~, **(\$500,000)**, the division shall require the contractor to execute a good and sufficient payment bond to the department for the state in an amount equal to one hundred percent (100%) of the total contract price. The bond shall include at least the following provisions:

(1) The contractor, its successors and assigns, whether by operation of law or otherwise, and all subcontractors, their successors and assigns, whether by operation of law or otherwise, shall pay all indebtedness that may accrue to any person on account of any labor or service performed or materials furnished in relation to the public work.

(2) The bond shall directly inure to the benefit of subcontractors, laborers, suppliers, and those performing service or who may have furnished or supplied labor, material, or service in relation to the public work.

(3) No change, modification, omission, or addition in or to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the procedures preliminary to the letting and awarding of the contract shall affect or operate to release or discharge the surety in any way.

(4) The provisions and conditions of this chapter shall be a part of the terms of the contract and bond.

(b) The division may permit the bond given by the contractor to provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal the total contract price.

(c) The division may accept bonds provided on forms specified by the division or on forms given by surety companies.

(d) The division shall hold the bond of a contractor for the use and benefit of any claimant having an interest in it and entitled to its benefits.

(e) The division shall not release sureties of a contractor until the expiration of one (1) year after the final settlement with the contractor.

(f) If the estimated cost of the public works project is less than ~~one~~ **or equal to five** hundred fifty thousand dollars ~~(\$150,000)~~ **(\$500,000)**, the director may require ~~one (1) of the following~~:

~~(1) The contractor must execute a good and sufficient payment bond. The director may determine the amount of the bond to be any percentage, but no more than one hundred percent (100%); of~~

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1       the cost of the project.

2       (2) the division ~~will to~~ withhold retainage under this chapter in an  
3       amount of ten percent (10%) of the dollar value of all payments  
4       made to the contractor until the public work is substantially  
5       completed.

6       SECTION 4. IC 4-13.6-7-7 IS AMENDED TO READ AS  
7       FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 7. (a) If the estimated  
8       cost of the public works project is ~~at least one more than five~~ hundred  
9       fifty thousand dollars (~~\$150,000~~) (**\$500,000**), the division shall require  
10      the contractor to execute a good and sufficient performance bond to the  
11      department for the state in an amount equal to one hundred percent  
12      (100%) of the total contract price. The bond shall include at least the  
13      following provisions:

14      (1) The contractor shall well and faithfully perform the contract.

15      (2) No change, modification, omission, or addition in or to the  
16      terms or conditions of the contract, plans, specifications,  
17      drawings, or profile or any irregularity or defect in the contract or  
18      in the procedures preliminary to the letting and awarding of the  
19      contract shall affect or operate to release or discharge the surety  
20      in any way.

21      (3) The provisions and conditions of this chapter shall be a part of  
22      the terms of the contract and bond.

23      (b) The division may permit the bond given by the contractor to  
24      provide for incremental bonding in the form of multiple or  
25      chronological bonds that, if taken as a whole, equal the total contract  
26      price.

27      (c) The division may accept bonds provided on forms specified by  
28      the division or on forms given by surety companies.

29      (d) The division shall not release sureties of a contractor until the  
30      expiration of one (1) year after the final settlement with the contractor.

31      SECTION 5. IC 5-16-5.5-2 IS AMENDED TO READ AS  
32      FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 2. To the extent that  
33      this chapter is applicable, all contracts between a contractor and a state  
34      agency concerning any public building, work, or improvement entered  
35      into after May 1, 1972, and which contracts are in excess of ~~one five~~  
36      hundred thousand dollars (~~\$100,000~~) (**\$500,000**) are to be governed  
37      by the provisions of this chapter, as are the rights and duties among the  
38      parties to the contract and any subcontractors who do any work under  
39      the contract. All contracts governed by the provisions of this chapter  
40      shall include provisions for the retainage of portions of payments by a  
41      state agency to contractors, by contractors to subcontractors, and for the  
42      payment of subcontractors.

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SECTION 6. IC 5-30-8-4, AS ADDED BY P.L.74-2005, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 4. **(a) This section does not apply to a project if the estimated cost of the project is less than or equal to five hundred thousand dollars (\$500,000).**

~~(a)~~ **(b)** The public agency shall require the design-builder to furnish performance and payment bonds for the project.

~~(b)~~ **(c)** A performance or payment bond is not required for, and does not provide coverage for, the part of a design-build contract that includes design services only.

~~(c)~~ **(d)** Subsection ~~(b)~~ **(c)** does not impair the ability of the public agency to seek recovery under the contract from the design-builder for errors, omissions, or defects in the design services.

SECTION 7. IC 8-15-2-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 5. The authority may do the following:

(1) Construct, maintain, repair, police, and operate toll road projects (as defined in this chapter), public improvements, and arterial streets and roads under section 1 of this chapter and establish rules for the use of any such toll road project, public improvement, or arterial street or road.

(2) Issue toll road revenue bonds of the state, payable solely from an allocation of money from the rural transportation road fund under IC 8-9.5-8-16 or from revenues or from the proceeds of bonds issued under this chapter and earnings thereon, or from all three (3), for the purpose of paying all or any part of the cost of any one (1) or more toll road projects or for the purpose of refunding any other toll road revenue bonds.

(3) Establish reserves from the proceeds of the sale of bonds or from other funds, or both, to secure the payment of the bonds.

(4) Fix and revise from time to time and charge and collect tolls for transit over each toll road project constructed by it.

(5) Acquire in the name of the state by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the right of condemnation in the manner as provided by this chapter, such public or private lands, including public parks, playgrounds or reservations, or parts thereof or rights therein, rights-of-way, property, rights, easements, and interests, as it may deem necessary for carrying out the provisions of this chapter. The authority may also:

(A) sell, transfer, and convey any such land or any interest therein so acquired, or any portion thereof, whether by

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1 purchase, condemnation, or otherwise, and whether such land  
2 or interest therein had been public or private, when the same  
3 shall no longer be needed for such purposes; and

4 (B) transfer and convey any such lands or interest therein as  
5 may be necessary or convenient for the construction and  
6 operation of any toll road project, or as otherwise required  
7 under the provisions of this chapter.

8 (6) Designate the locations and establish, limit, and control such  
9 points of ingress to and egress from each toll road project as may  
10 be necessary or desirable in the judgment of the authority to  
11 ensure the proper operation and maintenance of such projects, and  
12 to prohibit entrance to such project from any point not so  
13 designated. The authority shall not grant, for the operation of  
14 transient lodging facilities, either ingress to or egress from any  
15 project, including the service areas thereof on which are located  
16 service stations and restaurants, and including toll plazas and  
17 paved portions of the right-of-way. The authority shall cause to be  
18 erected, at its cost, at all points of ingress and egress, large and  
19 suitable signs facing traffic from each direction on the toll road.  
20 Such signs shall designate the number and other designations, if  
21 any, of all United States or state highways of ingress or egress, the  
22 names of all Indiana municipalities with a population of five  
23 thousand (5,000) or more within a distance of seventy-five (75)  
24 miles on such roads of ingress or egress, and the distance in miles  
25 to such designated municipalities.

26 (7) Make and enter into all contracts and agreements necessary or  
27 incidental to the performance of its duties and the execution of its  
28 powers under this chapter or IC 8-9.5-8. When the cost under any  
29 such contract or agreement, other than a contract for  
30 compensation for personal services, a contract with the  
31 department under IC 8-9.5-8-7, or a lease with the department  
32 under IC 8-9.5-8-8, involves an expenditure of more than ten  
33 thousand dollars (\$10,000), the authority shall make a written  
34 contract with the lowest and best bidder after advertisement for  
35 not less than two (2) consecutive weeks in a newspaper of general  
36 circulation in Marion County, Indiana, and in such other  
37 publications as the authority shall determine. Such notice shall  
38 state the general character of the work and the general character  
39 of the materials to be furnished, the place where plans and  
40 specifications therefor may be examined, and the time and place  
41 of receiving bids. Each bid shall contain the full name of every  
42 person or company interested in it and shall be accompanied by

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a sufficient bond or certified check on a solvent bank that if the bid is accepted a contract will be entered into and the performance of its proposal secured. The authority may reject any and all bids. A bond with good and sufficient surety shall be required by the authority of all contractors in an amount equal to at least fifty percent (50%) of the contract price, conditioned upon the faithful performance of the contract. **The authority may not require a bid, performance, or payment bond from a contractor for a project if the estimated cost of the project is less than or equal to five hundred thousand dollars (\$500,000).**

(8) Employ consulting engineers, superintendents, managers, and such other engineers, construction and accounting experts, bond counsel, other attorneys with the approval of the attorney general, and other employees and agents as may be necessary in its judgment to carry out the provisions of this chapter, and to fix their compensation. However, all such expenses shall be payable solely from the proceeds of toll road revenue bonds issued under the provisions of this chapter or from revenues.

(9) Receive and accept from any federal agency, subject to IC 8-23-3, grants for or in aid of the construction of any toll road project, and receive and accept aid or contributions from any source of either money, property, labor, or other things of value, to be held, used, and applied only for the purposes for which such grants and contributions may be made, and repay any grant to the authority or to the department from a federal agency if such repayment is necessary to free the authority from restrictions which the authority determines to be in the public interest to remove.

(10) Establish fees, charges, terms, or conditions for any expenditures, loans, or other form of financial participation in projects authorized as public improvements on arterial streets and roads under section 1 of this chapter.

(11) Accept gifts, devises, bequests, grants, loans, appropriations, revenue sharing, other financing and assistance, and any other aid from any source and agree to and comply with conditions attached to the aid.

(12) Accept transfer of a state highway to the authority under IC 8-23-7-23 and pay the cost of conversion of the state highway to a toll road project.

(13) Enter into contracts or leases with the department under IC 8-9.5-8-7 or IC 8-9.5-8-8 and in connection with the contracts or leases agree with the department for coordination of the

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operation and the repair and maintenance of toll road projects and tollways which are contiguous parts of the same public road, including joint toll collection facilities and equitable division of tolls.

(14) Do all acts and things necessary or proper to carry out this chapter.

SECTION 8. IC 8-23-7-19 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 19. (a) If an exchange under section 17 of this chapter includes improvements to be constructed on either parcel of real property, the department shall enter into an agreement with the owner of the parcel of property that the department will receive. An agreement under this section must include the following:

(1) The appraisal required under section 18 of this chapter must include the value of improvements constructed or to be constructed on the property.

(2) The construction contract for improvements under this section must be guaranteed by a construction or performance bond issued by a surety company approved by the department. **The department may not require a performance bond from a contractor for a project if the estimated cost of the project is less than or equal to five hundred thousand dollars (\$500,000).**

(3) The plans and specifications for improvements under this section must be certified by a licensed architect or engineer.

(b) The department must approve in writing the construction contract, bond, plans, and specifications for the improvements before entering into an exchange agreement under this section.

SECTION 9. IC 8-23-9-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 8. **(a) This section does not apply to a project if the estimated cost of the project is less than or equal to five hundred thousand dollars (\$500,000).**

**(b) Each bidder must submit a bid guarantee and a performance bond payable to the state with the bidder's proposal. ~~On contracts of one hundred thousand dollars (\$100,000) or less the commissioner may waive the bond requirements.~~** Instead of the bond, the department may establish by rule the requirements that, in its discretion, are necessary to assure payment of subcontractors, suppliers, and employees by the contractor.

SECTION 10. IC 36-1-12-4.5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 4.5. **(a) This section applies to contracts for public work only if the cost of the public work is estimated to be more than five hundred thousand dollars**

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1 **(\$500,000).**

2 ~~(a)~~ **(b)** A bond or a certified check shall be filed with each bid by a  
3 bidder in the amount determined and specified by the board in the  
4 notice of the letting.

5 ~~(b)~~ **(c)** The amount of the bond or certified check may not be set at  
6 more than ten percent (10%) of the contract price. The bond or certified  
7 check shall be made payable to the political subdivision or agency.

8 ~~(c)~~ **(d)** All checks of unsuccessful bidders shall be returned to them  
9 by the board upon selection of successful bidders. Checks of successful  
10 bidders shall be held until delivery of the performance bond, as  
11 provided in section 14(e) of this chapter.

12 SECTION 11. IC 36-1-12-13.1 IS AMENDED TO READ AS  
13 FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 13.1. (a) This section  
14 applies to contracts for public work only if the cost of the public work  
15 is estimated to be more than ~~one~~ five hundred thousand dollars  
16 ~~(\$100,000).~~ **(\$500,000).**

17 (b) The contractor shall execute a payment bond to the appropriate  
18 political subdivision or agency, approved by and for the benefit of the  
19 political subdivision or agency, in an amount equal to the contract  
20 price. The payment bond is binding on the contractor, the  
21 subcontractor, and their successors and assigns for the payment of all  
22 indebtedness to a person for labor and service performed, material  
23 furnished, or services rendered. The payment bond must state that it is  
24 for the benefit of the subcontractors, laborers, material suppliers, and  
25 those performing services.

26 (c) The payment bond shall be deposited with the board. The  
27 payment bond must specify that:

28 (1) a modification, omission, or addition to the terms and  
29 conditions of the public work contract, plans, specifications,  
30 drawings, or profile;

31 (2) a defect in the public work contract; or

32 (3) a defect in the proceedings preliminary to the letting and  
33 awarding of the public work contract;

34 does not discharge the surety. The surety of the payment bond may not  
35 be released until one (1) year after the board's final settlement with the  
36 contractor.

37 (d) A person to whom money is due for labor performed, material  
38 furnished, or services provided shall, within sixty (60) days after the  
39 completion of the labor or service, or within sixty (60) days after the  
40 last item of material has been furnished, file with the board signed  
41 duplicate statements of the amount due. The board shall forward to the  
42 surety of the payment bond one (1) of the signed duplicate statements.

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1 However, failure of the board to forward a signed duplicate statement  
 2 does not affect the rights of a person to whom money is due. In  
 3 addition, a failure to forward the statement does not operate as a  
 4 defense for the surety.

5 (e) An action may not be brought against the surety until thirty (30)  
 6 days after the filing of the signed duplicate statements with the board.  
 7 If the indebtedness is not paid in full at the end of that thirty (30) day  
 8 period, the person may bring an action in court. The court action must  
 9 be brought within sixty (60) days after the date of the final completion  
 10 and acceptance of the public work.

11 SECTION 12. IC 36-1-12-14 IS AMENDED TO READ AS  
 12 FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 14. (a) This section  
 13 applies to public work contracts in excess of ~~one~~ five hundred thousand  
 14 dollars (~~\$100,000~~) (\$500,000) for projects other than highways, roads,  
 15 streets, alleys, bridges, and appurtenant structures situated on streets,  
 16 alleys, and dedicated highway rights-of-way. This section also applies  
 17 to a lessor corporation qualifying under IC 21-5-11 or IC 21-5-12 or  
 18 any other lease-back arrangement containing an option to purchase,  
 19 notwithstanding the statutory provisions governing those leases.

20 (b) A board that enters into a contract for public work, and a  
 21 contractor who subcontracts parts of that contract, shall include in their  
 22 respective contracts provisions for the retainage of portions of  
 23 payments by the board to contractors, by contractors to subcontractors,  
 24 and for the payment of subcontractors. At the discretion of the  
 25 contractor, the retainage shall be held by the board or shall be placed  
 26 in an escrow account with a bank, savings and loan institution, or the  
 27 state as the escrow agent. The escrow agent shall be selected by mutual  
 28 agreement between ~~the~~ board and contractor or contractor and  
 29 subcontractor under a written agreement among the bank or savings  
 30 and loan institution and:

- 31 (1) the board and the contractor; or  
 32 (2) the subcontractor and the contractor.

33 The board shall not be required to pay interest on the amounts of  
 34 retainage that it holds under this section.

35 (c) To determine the amount of retainage to be withheld, the board  
 36 shall:

- 37 (1) withhold no more than ten percent (10%) of the dollar value  
 38 of all work satisfactorily completed until the public work is fifty  
 39 percent (50%) completed, and nothing further after that; or  
 40 (2) withhold no more than five percent (5%) of the dollar value of  
 41 all work satisfactorily completed until the public work is  
 42 substantially completed.

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If upon substantial completion of the public work minor items remain uncompleted, an amount computed under subsection (f) of this section shall be withheld until those items are completed.

(d) The escrow agreement must contain the following provisions:

(1) The escrow agent shall invest all escrowed principal in obligations selected by the escrow agent.

(2) The escrow agent shall hold the escrowed principal and income until receipt of notice from the board and the contractor, or the contractor and the subcontractor, specifying the part of the escrowed principal to be released from the escrow and the person to whom that portion is to be released. After receipt of the notice, the escrow agent shall remit the designated part of escrowed principal and the same proportion of then escrowed income to the person specified in the notice.

(3) The escrow agent shall be compensated for the agent's services. The parties may agree on a reasonable fee comparable with fees being charged for the handling of escrow accounts of similar size and duration. The fee shall be paid from the escrowed income.

The escrow agreement may include other terms and conditions consistent with this subsection, including provisions authorizing the escrow agent to commingle the escrowed funds with funds held in other escrow accounts and limiting the liability of the escrow agent.

(e) The contractor shall furnish the board with a performance bond equal to the contract price. If acceptable to the board, the performance bond may provide for incremental bonding in the form of multiple or chronological bonds that, when taken as a whole, equal the contract price. The surety on the performance bond may not be released until one (1) year after the date of the board's final settlement with the contractor. The performance bond must specify that:

(1) a modification, omission, or addition to the terms and conditions of the public work contract, plans, specifications, drawings, or profile;

(2) a defect in the public work contract; or

(3) a defect in the proceedings preliminary to the letting and awarding of the public work contract;

does not discharge the surety.

(f) The board or escrow agent shall pay the contractor within sixty-one (61) days after the date of substantial completion, subject to sections 11 and 12 of this chapter. Payment by the escrow agent shall include all escrowed principal and escrowed income. If within sixty-one (61) days after the date of substantial completion there

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1 remain uncompleted minor items, an amount equal to two hundred  
 2 percent (200%) of the value of each item as determined by the  
 3 architect-engineer shall be withheld until the item is completed.  
 4 Required warranties begin not later than the date of substantial  
 5 completion.

6 (g) Actions against a surety on a performance bond must be brought  
 7 within one (1) year after the date of the board's final settlement with the  
 8 contractor.

9 (h) This subsection applies to public work contracts of less than two  
 10 hundred fifty thousand dollars (\$250,000). The board may waive the  
 11 performance bond requirement of subsection (e) and accept from a  
 12 contractor an irrevocable letter of credit for an equivalent amount from  
 13 an Indiana financial institution approved by the department of financial  
 14 institutions instead of a performance bond. Subsections (e) through (g)  
 15 apply to a letter of credit submitted under this subsection.

16 SECTION 13. [EFFECTIVE JUNE 30, 2006] (a) **The amendments**  
 17 **made to the Indiana Code by this act apply only to public works**  
 18 **contracts entered into after June 30, 2006.**

19 (b) **This SECTION expires July 1, 2010.**

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SENATE MOTION

Madam President: I move that Senators Young R Michael and Rogers be added as coauthors of Senate Bill 360.

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COMMITTEE REPORT

Madam President: The Senate Committee on Governmental Affairs and Interstate Cooperation, to which was referred Senate Bill No. 360, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill DO PASS.

(Reference is made to Senate Bill 360 as introduced.)

HERSHMAN, Chairperson

Committee Vote: Yeas 9, Nays 1.

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